United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR THE APPELLEE

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 19801

LORTON BLAIR, ET AL.,

Appellants,

v.

ORVILLE FREEMAN,
Secretary of Agriculture,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.), the Secretary of Agriculture is authorized to provide in milk marketing orders for the payment of a differential to nearby producers.

2. Whether the Secretary's 1957 decision to provide for nearby differentials in the New York-New Jersey Milk Marketing Order has adequate record support.

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COUNTERSTATEMENT

1. Introduction

Since 1938 the marketing of milk and milk products in New York City and certain suburban counties has been regulated under a milk marketing order promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 et seq. In 1957, the marketing area embraced by the order was extended to include additional portions of New York State as well as counties in Northern New Jersey.

The order provides for the establishment of uniform minimum prices which handlers are obligated to pay producers for their milk. Under specified circumstances, however, certain producers are to receive additional differentials. This case is concerned with the validity of one of those differentials: a "nearby differential" paid to producers whose farms are situated within a specified proximity to the population center of the New York-New Jersey market. Appellants, Pennsylvania producers who, because of the location of their farms, are not eligible for "nearby differentials", seek to have that differential declared violative of the congressional enactment upon which it is based. Alternatively they argue that the Secretary's findings, upon which his judgment in favor of "nearby differential" payments was predicated, is "irrational" and without evidentiary support. The district court, on cross-motion for summary judgment, rejected each of those contentions.

The Act and the milk marketing order here drawn in question comprise a portion of a complex scheme of regulation of the dairy industry. In order that the correctness of the decision below may be evaluated fully, it is essential first to consider the unusual economic difficulties which beset that multi-billion dollar industry and then to examine the statutory background of the Act and Marketing Order which attempt to relieve some of the worst of those difficulties.

2. Economic and regulatory background

(a) The problems of the milk industry

Peculiar and difficult problems beset the dairy industry. Fluid milk must be consumed relatively quickly after it is produced because it is naturally "a fertile field for the growth of bacteria."[1/] If it cannot be marketed quickly in fluid form, it must be "manufactured" into cheese, butter or other milk products which can be stored for considerable periods. Milk which must be manufactured is referred to in the trade as "surplus." Surplus milk commands a lower price on the market than fluid milk not because it is in any way inferior in quality, but because it must be manufactured into products which are in direct competition with similar items from across the nation, often made from milk of lower quality and in "low cost production areas far removed from metropolitan centers."[2/]

It is, therefore, natural that every farmer would prefer to dispose of his milk for the higher value fluid uses. Unfortunately, this desire cannot be fulfilled. First, the daily demand for fluid milk varies considerably. If the milk

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1/ United States v. Rock Royal Co-op., 307 U.S. 533, 549.

2/ Id., at p. 550.

companies are to meet this varying demand, reserve supplies of milk of a quality suitable for human consumption must always be available.[3] The portion of this necessary reserve not actually needed and used in fluid form is, of course, "surplus." Secondly, dairy cows produce more milk in the spring (the "flush" season) than they do in the fall. Dairy herds sufficient to produce a supply of milk adequate for consumer needs in the fall produce a superabundance in the spring. Thus, the very maintenance of adequate supplies of milk inevitably brings with it the problem of surplus.[4]

(b) Regulation under the Agricultural Marketing Agreement Act of 1937

In the early 1930's, the availability of large quantities of surplus milk had a disastrous effect upon the nation's dairy farmers. In the five-year period ending December 31, 1933, the wholesale price of milk sold by farmers fell fifty percent, although, at the same time, milk companies were still able to make a net profit on their investment in excess of 25 per cent.[5] Extreme cut-throat competition for the more

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3/ "Under the best practical adjustment of supply to demand the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control * * *." Nebbia v. New York, 291 U.S. 502, 517.

4/ For a detailed discussion by the Supreme Court of the factors which make regulation of the milk industry a necessity see Nebbia v. New York, 291 U.S. 502, 516-518, and United States v. Rock Royal Co-op, 307 U.S. 533, 550.

5/ House of Representatives Concurrent Resolution No. 32, 73d Cong., 2d Sess., May 14, 1934, directing the Federal Trade Commission to investigate the dairy industry.

lucrative fluid milk market engendered business practices which jeopardized "the quality and in the end the quantity"[6/] of the vital fluid milk supply.

To deal with this problem, one which cooperatives and state regulatory agencies had been unable to solve, Congress entered the field - first under the Agricultural Adjustment Act Amendments of 1935, Section 5 (49 Stat. 753), and then under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, which, as amended, is now 7 U.S.C. 601, et seq. That Act establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, inter-state or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish as the prices to farmers, parity prices * * *" and as will avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. 602.

6/ United States v. Rock Royal Co-op, 307 U.S. 533, 550.

The regulatory plan of the statute, described and held constitutional in United States v. Rock Royal Co-op., 307 U.S. 533, and H.P. Hood & Sons v. United States, 307 U.S. 588, authorizes the Secretary of Agriculture to issue regional marketing orders, each order being specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c(5), (11). The basic function of the orders is to establish minimum use prices and to assure the payment of uniform minimum prices to farmers by "handlers," a term defined to include "processors, associations of producers, and others engaged in the handling of * * *" the commodity or product.

To this end, Section 8c(5), 7 U.S.C. 608c(5), provides that a milk order shall contain one or more of certain terms and conditions specified in the section. These include, inter alia, (1) the classifying of milk in accordance with its utilization; (2) the fixing, or providing a method for the fixing of minimum uniform prices for each use classification which all handlers shall pay; (3) the payment of uniform prices to producers irrespective of the ultimate use of their milk, subject only to specified differentials and (4) the adjustment of the payments by handlers in order that the total sum paid by the handler for milk purchased by him shall not be less than the value of the milk at the use

classification prices. The Section also stipulates that there are to be no terms and conditions other than those therein described "except as provided in subsection (7)." In this connection Subsection (7)(D) authorizes the inclusion of such auxiliary provisions as are "incidental to and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

3. Milk Marketing Order No. 2.

The New York-New Jersey Milk Marketing Order (formerly Order No. 27 (7 C.F.R. 927.1 et seq.), now Order No. 2. (7 C.F.R. 1002.1 et seq.)[7/] was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in New York City and three suburban counties (Westchester, Nassau and Suffolk). 3 F.R. 1945, 1957, 2100, 2102.[8/] In 1957, the order was amended and the regulated marketing area extended to Northern New Jersey and certain additional

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7/ A general reorganization of chapter IX of Title 7 of the Code of Federal Regulations during 1961 resulted in the redesignation of most of the milk marketing orders. See Lehigh Valley Coop. v. United States, 370 U.S. 76, 78.

8/ Order No. 2 is part of a joint federal-state program. It is complementary to the New York State Revised Official Order No. 126 and New Jersey Revised Official Order No. 57-3.

counties in New York. 22 F.R. 4643. The scheme of the order was examined by the Supreme Court in United States v. Rock Royal Co-op., supra, and several attacks upon its validity rejected.[9] In the course of its opinion, the Court discussed the milk marketing problem in the area covered by the order, with particular reference to the profitability and perishability of fluid milk, the requirements for sanitation, the surplus which results during low consumption periods because of the amounts needed to fill demands during peak consumption periods, the use of surplus for cream, butter, cheese, milk powder and other relatively non-perishable products, the cut-throat competition, and the need for a fair division of the fluid milk market among producers.

The order as it now stands (7 C.F.R. 1002.1 et seq.), establishes a marketwide pool and requires the classification, pooling and pricing of all milk delivered by "producers" or associations or producers to "pool plants." Pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.[10] The term "producer" is defined in general to include "any dairy farmer

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9/ See also, Lehigh Valley Coop. v. United States, 370 U.S. 76, 78-81.

10/ The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 1002.24-1002.29.

who delivers pool milk * * * to a pool plant [or] a pool bulk tank unit * * *." 7 C.F.R. 1002.6.

As a general rule "producers" do not distribute fluid milk or milk products to consumers or consumer outlets; that function is carried out by "handlers." 7 C.F.R. 1002.7. The order recognizes, however, that producers may consider it advantageous to distribute milk directly without the intervention of a handler. Accordingly, it provides that the Market Administrator may designate qualifying handlers as "producer-handlers," and exempt them from the pricing requirements. For a handler to qualify as a "producer-handler" he may handle "no whole milk, fluid skim milk, or cream other than that derived from the milk production facilities" under his exclusive control; he may not be associated with the "control or management of the operation of another plant or another handler, nor [may] another handler [be] so associated with his operation"; and, the handler must "sell more than an average of 100 quarts per day of Class I-A milk to persons in the marketing area other than to other plants." 7 C.F.R. 1002.15(b).

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk received at pool plants is classified into three basic categories according to its utilization: Class I (Fluid Milk),[11/]

11/ Class I is further subdivided; Class I-A is fluid milk consumed within the marketing area; Class I-B is fluid milk produced within the marketing area but neither processed nor consumed therein. 7 C.F.R. 1002.37(a) and (b).

Class II (cream), and Class III (Milk products, butter, cheese, etc.). 7 C.F.R. 1002.37. Pursuant to the order, the receiving pool plant handlers make monthly reports to the Market Administrator as to the quantity of milk purshased by them which falls into each of the use classes. 7 C.F.R. 1002.50. The Administrator calculates the "minimum prices" for each use classification (7 C.F.R. 1002.40) and, from these prices, applied to the reported utilization of all handlers each month, he calculates a "uniform" or "blend" price (7 C.F.R. 1002.65, et seq.) which is the minimum that each pool plant handler must pay to his producers. 7 C.F.R. 1002.70).[12/]

The Market Administrator maintains a fund known as the "Producer Settlement Fund". 7 C.F.R. 1002.75, et seq. Each pool plant handler whose average uses place his milk in a higher return category than the average for the market must pay into the Producer Settlement Fund the amount by which the

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12/ The formula underlying the blend price has been described by this Court as follows:

"The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk." Grant v. Benson, 229 F. 2d 765, 767/(C.A.D.C.), certiorari denied, 350 U.S. 1015. 97 App. D. C. 191

use "value" of his milk exceeds the uniform price required to be paid the producers. Each handler whose use value of milk purchased is less than the uniform blend price required to be paid to the producers is entitled to withdraw the amount of the difference from the Producer Settlement Fund.

Thus, while every producer receives a uniform minimum price for the milk he sells regardless of the use made of it by the particular pool plant handlers to whom he sells, the handlers are required to pay varying amounts geared to the uses which they actually make of the milk. 7 C.F.R. 1002.79 et seq.; Grant v. Benson, 229 F. 2d 765, 767/(C.A.D.C.). 97 App. D.C. 191

As noted, however, under the Agricultural Marketing Agreement Act the uniform minimum price may be subject to certain differentials, including "location" differentials, 7 U.S.C. 608c(5)(A)and(B). The New York - New Jersey Order provides for three types of location differentials: transportation, direct delivery and nearby differentials. 7 C.F.R. 1002.71. The transportation differential was promulgated in recognition of the fact that the value of milk is inextricably tied to the cost of hauling it to market. See 22 F.R. 4212. Hence, the market administrator has determined a freight zone for each pool plant in the marketing area. Class prices paid by handlers and uniform prices received by producers are plus or minus the specified differential. The 201-210 milk zone is utilized as the base zone; that is, no differential is paid for milk received in

pool plants within that zone. A differential is paid, however, for milk received in pool plants situated in zones more proximately located to the specified market centers and, the class and uniform price for milk received at more distant plants is reduced correspondingly, see 7 C.F.R. 1002.42. The direct delivery differential is, in general, a differential paid by handlers to producers who deliver milk directly to the handler's plant if that plant is located within 70 miles of the specified market centers. 7 C.F.R. 1002.71(c). It is intended to "reflect * * * factors other than those associated with varying transportation costs." 22 F.R. 4212. Appellants do not challenge the validity or reasonableness of these two location differentials; their challenge is directed to the "nearby differential" alone.

"Nearby differentials" are adjustments "to the uniform price [paid] to producers located relatively near the metropolitan New York - New Jersey area, and which reflect factors other than the cost [of] transportation." 22 F.R. 4212. Historically, "nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market." 22 F.R. 4213. This is largely because nearby producers have enjoyed a relatively more even seasonal production and a considerably higher percentage of fluid utilization. Hence, the object of the nearby differential

"is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools." 22 F.R. 4213-4214.[13/]

Since the share of the fluid milk market which the nearby producer relinquishes depends not uppn the utilization of his milk alone, but upon the utilization of all milk in the market, the amount of the nearby differential is made dependent uppn marketwide utilization. 7 C.F.R. 1002.71(b)(3). If marketwide utilization of milk for Class I purposes is high, the nearby producer has given up little by virtue of pooling. On the other hand, if fluid utilization is low, it is the nearby producer who is making the greater contribution of Class I milk to the pool. Hence, the differential is made dependent upon marketwide utilization (not on the particular utilization made of the individual producer's milk). It is highest when the marketwide percent of Class-I utilization to total utilization is less than 45% and not provided for when it is 80% or more. Furthermore,

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13/ Under a marketing order providing for "handler pools" rather than "marketwide pools", the utilization value of the milk disposed of by each handler is computed separately. The producer's minimum return is based on his own handler's average uses rather than the average uses of the market as a whole. This form of regulation does not involve a Producers Settlement Fund since the individual handler's uniform minimum payments to his producers will coincide with the total utilization value of the milk received from them.

since location is the critical factor, the extent of the differential is, in addition, made dependent upon the proximity of the farm to specified utilization centers: farms located withinthe 1-50 mile range receive the highest differential, those in the 111-120 mile range the lowest of farms qualifying at all for a nearby differential. Ibid. In order more precisely to reflect historical utilization, farms in specified counties are placed within zones not exactly reflective of their actual mileage from the basing points. 7 C.F.R. 1002.71(b)(4) and (5).

While the New York marketing order has, since its inception in 1938, provided for what now are designated to be transportation, direct delivery and nearby differentials, the propriety of those adjustments was reconsidered in 1957 when the extension of the marketing area to embrace upstate New York and New Jersey was the subject of administrative inquiry, an inquiry initiated by public notice (21 F.R. 3537, 3799 and 22 F.R. 1219). Following the holding of public hearings at which considerable testimony was taken and an extensive record compiled (22 F.R. 4194), a recommended decision was issued (22 F.R. 3318) and time was given for the filing of exceptions. On June 14, 1957, the Secretary issued his findings and conclusions, which included location differentials as described above. 22 F.R. 4194, 4212-4216. As required by the Act (7 U.S.C. 608c(9)(B))

a referendum was held among producers for the marketing area, as revised, which producers approved the amended order by more than the required two-thirds majority. Accordingly, the amended order was issued effective August 1, 1957. 22 F.R. 4643.

4. This case.

Appellants are Pennsylvania producers whose milk is marketed for the New York-New Jersey Marketing area. They are not, however, among the class of producers who qualify for nearby differentials, the sole differential which they challenge as ultra vires and unreasonable. As members of the Eastern Milk Producers Cooperative all but one participated in the 1957 hearings and opposed that differential. However, not until the filing of the present action in 1965 did they challenge the 1957 promulgation. Moreover, at no time have they requested the Secretary of Agriculture to hold an amendatory hearing.

On cross-motions for summary judgment the district court ruled in favor of the Secretary as follows (J. App. A. p. 58):

> * * * I think the regulations are in accord with the basic statute. They are in harmony with the basic statute.
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> I think the record is very clear that the Secretary of Agriculture ran extensive hearings, in accordance with due process, and gave all interested parties a chance to be heard. I think the hearings extended over a year from the beginning until the final order was promulgated. Everyone had an opportunity to be heard and make their exceptions.
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> * * *
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> THE COURT: I think there is ample evidence in the record on which the Secretary could act and I am not about to substitute my judgment on the evaluation of that evidence. I think that is his prerogative. He has been assigned the job by the Congress of writing this regulatory statute. I think we will all agree on the procedures of administrative law that I cannot substitute my judgment for his.

STATUTE AND ADMINISTRATIVE PROMULGATIONS INVOLVED

The pertinent portions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 et seq., are set forth in the appendix to this brief. The New York - New Jersey Milk Marketing Order (Order No. 2), as well as the administrative announcements and findings issued prior to the adoption of that order, are reproduced in Volume B of the Joint Appendix.

SUMMARY OF ARGUMENT

Congress, desirous of eliminating cut-throat competition between milk producers, enacted the Agricultural Marketing Agreement Act (50 Stat. 246, as amended, 7 U.S.C. 601 et seq.) and authorized the Secretary of Agriculture to promulgate milk marketing orders with the object, inter alia, of insuring that producers would receive uniform minimum prices for their milk regardless of the use made by the handlers of their particular production. 7 U.S.C. 608c(5). It recognized, however, that complete uniformity would itself be inequitable; accordingly, the Secretary was authorized to provide for the payment of differentials to producers where appropriate -- including a differential based on "the locations at which delivery of such milk is made." 7 U.S.C. 608c(5)(B)(c).

Concluding that producers proximately located to the population centers of the area embraced by the New York - New Jersey milk marketing order were equitably entitled to adjustments to the uniform prices they would otherwise receive, the Secretary provided for "nearby differentials" in that marketing order. 7 C.F.R. 1002.71(b). The appellants would have this Court hold that provision invalid arguing (1) that it violates the congressional enactment upon which it is based, and (2) that the Secretary's judgment to include nearby differentials in the New York - New Jersey order is without record support.

In Point I we show that the nearby differential is precisely the type of adjustment contemplated in 7 U.S.C. 608c(5)(B)(c); it is an adjustment based on location, not on utilization. Moreover, it is consistent with the Secretary's long-standing construction of 7 U.S.C. 608c(5)(B)(c) and it has been approved judicially and ratified by Congress. Finally, it is necessary to prevent discrimination against nearby producers who, without the differential, would be required to confer a substantial benefit upon non-nearby producers without receiving a quid pro quo.

In Point II we show that the extensive record compiled during the 1957 promulgation hearing which resulted in an extension of the New York order to include additional portions of New York State as well as counties in northern New Jersey amply justifies the Secretary's decision to provide for nearby differentials in the New York-New Jersey Milk Marketing Order.

ARGUMENT

THE ARGICULTURAL MARKETING AGREEMENT ACT PERMITS NEARBY DIFFERENTIALS WHERE APPROPRIATE; THE SECRETARY'S FINDING THAT THE INCLUSION OF NEARBY DIFFERENTIALS IN THE NEW YORK - NEW JERSEY MILK MARKETING ORDER IS HISTORICALLY AND ECONOMICALLY JUSTIFIED HAS SUBSTANTIAL RECORD SUPPORT

INTRODUCTION

As noted above, one of the fundamental objectives of the provisions of the Agricultural Adjustment Act relating to the marketing of milk is to insure that the producers will receive uniform minimum prices for their milk regardless of the use made by the handlers of their particular production. However, in recognition of the fact that complete uniformity would lead to inequities, the Secretary has been authorized to allow "adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketing of milk during a representative period of time." 7 U.S.C. 608c(5)(B). This case is concerned with the third permissible group of adjustments -- location differentials. Acting in implementation of that provision the Secretary has provided for, and the affected producers have by referendum approved, three types of location

differentials with respect to production regulated under the New York - New Jersey Milk Marketing Order: transportation, direct delivery and nearby differentials. The challenge here is directed only to the last.

At the outset it is appropriate to note that a regulatory scheme may be overturned only if it is "unreasonable and plainly inconsistent with" the statute it is designed to implement. Commissioner of Internal Revenue v. South Texas Lumber Co., 333 U.S. 496, 501; accord, e.g., United States v. Shimer, 367 U.S. 374, 381-383; Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90. This, we suggest, is particularly true of milk marketing orders promulgated pursuant to the Agricultural Marketing Agreement Act. For, as the Supreme Court noted in Stark v. Wickard, 321 U.S. 288, 310, the terms of such orders "are largely matters of administrative discretion * * * [t]echnical details of the milk business are left to the Secretary and his aides." Accordingly, wide discretion is vested in the Secretary to include, on the basis of evidence adduced at a public hearing, provisions that are found by him to be necessary, in the operation of a marketwide pool, to attain the legislative goal. See, e.g., Grant v. Benson, 229 F. 2d 765, 769-772 (C.A.D.C.), certiorari denied, 350 U.S. 1015; Queensboro Farm Products v. Wickard, 137 F. 2d 969, 974, 977 (C.A. 2). It is the function of the Secretary, not the courts, to devise an appropriate method of classifying and pricing milk. Waddington Milk Co. v. Wickard, 140 F. 2d 97, 101 (C.A. 2); Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87,

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94 (C.A. 8), certiorari denied, 329 U.S. 788.

It is in this setting that appellants' attacks must be viewed. As we show, nearby differentials are not "plainly inconsistent" with the statutory scheme; indeed, they are, as the amply supported findings of the Secretary reflect, indispensable in the New York - New Jersey marketing area if the congressional objectives of stability and the elimination of cut-throat competition are to be realized.

I

THE "NEARBY DIFFERENTIAL" IS A REASONABLE ADJUSTMENT BASED UPON LOCATION AND AS SUCH IS AUTHORIZED EXPRESSLY BY 7 U.S.C. 608c(5)(B).

It is common ground that the Agricultural Marketing Agreement Act permits adjustments to the uniform blend prices paid producers for the same quality milk. That is, though the elimination of cut-throat competition and the equitable distribution of the market among all producers is the primary objective of the marketing order provisions of the Act, Congress recognized that absolute uniformity would itself create inequities. For the milk of certain producers is, by virtue of the producers' proximity to the utilization centers alone, of greater benefit to the market than the equivalent production of more distant producers. Hence, while providing "for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made

of such milk by the individual handler to whom it is delivered" (7 U.S.C. 608c(5)(B)(ii)), Congress authorized adjustments to the uniform price, including an adjustment predicated upon "the locations at which delivery of such milk is made." 7 U.S.C. 608c(5)(B)(c). We do not understand the appellants to take issue with the propriety of location differentials in general. Instead, they argue (1) that, although promulgated as adjustments based upon location, the nearby differential is in fact an unauthorized utilization differential, and (2) that, even if it is a location differential, it is rendered invalid by virtue of its arbitrary and discriminatory application. Neither contention is at all meritorious.

A. The Nearby Differential Is an Adjustment Based upon Location.

1. Authorization for the promulgation of location differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. By way of explanation, the Committee Reports state:

> The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. [H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10.]

From the foregoing we think it evident that Congress intended by location differentials to compensate producers for the added

value of their milk which is attributable to his "distance from a primary market." That, precisely, is the objective of the "nearby differential." A producer's eligibility for a nearby differential turns exclusively upon the distance of his farm from the marketing center of the area embraced within the New York - New Jersey Order. The 120-mile nearby differential area has been divided into eight zones: 1-50 miles, 51-60, 61-70, 71-80, 81-90, 91-100, 101-110, and 111-120. The farther away the zone, the less the differential to which producers within that zone are entitled. There are two exceptions to the strict distance test. Farms in a limited number of counties have been placed within zones which do not reflect their actual distance from the basing points; but even here location is critical. 7 C.F.R. 1002.71(b)(4). And, producers who qualify geographically for nearby differentials lose that differential if they deliver to plants outside of the nearby area.[14/]

Admittedly, the extent of the differential is also made dependent upon the percentage of fluid utilization in the market area. But that fact, as we show, infra, pp. 25-27, does not convert

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14/ There is an exception to this exclusion. Nearby producers still will be eligible for differentials for deliveries made outside the geographical limits of the nearby area providing the delivery is made to a plant within the 140-mile zone or, if made to plants in specified counties, within the 150-mile zone. 7 C.F.R. 1002.71(b)(5).

the adjustment into a utilization differential. Utilization has an effect on the extent of the differential received by all of the producers in any particular zone, but it has no effect on eligibility. That determination, by the unqualified terms of the order, is based exclusively on location.

There is no greater substance to the suggestion (App. Br. p. 31) that, even if it is a location differential, the nearby differential is not of the type contemplated by Congress. To be sure the Act speaks of adjustments for "the locations at which delivery of such milk is made" (7 U.S.C. 608c(5)(B)(c)) and the nearby differential, in terms, is keyed to the situs of production; however, in operation the order conforms strictly to the legislative directive.

It was true in 1957, as it is today, that the delivery of milk is highly mechanized. No longer is it the responsibility of the producer first to place his milk in cans and then to transport the cans to the handler; no longer is delivery accomplished at the handler's plant. Today, generally, the farmer simply pumps his milk from a storage tank on his farm into the handler's bulk tank truck where it is co-mingled with the milk of other producers and for all purposes enters the control of the handler. And, even as to those producers who still place their milk in cans, delivery, under their contracts with cooperatives, is effected at the farm. In short, delivery, today, is accomplished not at the handler's plant as it was twenty years ago, but at the farm. See 22 F.R. 4213. Finally, any lingering

doubt as to whether the nearby differential is in fact dependent upon "the locations at which delivery of such milk is made" is certainly dispelled by 7 C.F.R. 1002.71(b)(5) which, generally, affords nearby producers a differential only if their production is "deliver[ed] to plants" within the nearby area.

2. The main thrust of appellants' argument represents an endeavor to demonstrate that nearby differentials are adjustments based not on location, but on use. In support of that contention they point to the fact that the amount of the differential is affected by the percentage of Class I utilization in the marketing area. The differential is highest when fluid utilization is lowest; as the percentage of Class I to Class II and III utilization increases marketwide, the nearby differential decreases to the point that no nearby adjustment is paid when 80 percent or more of utilization is in Class I form. 7 C.F.R. 1002.71(3). Appellants, however, misunderstand the statutory proscription against giving consideration to the utilization factor in remunerating producers. The statute, preliminary to its authorizing adjustments, provides "for the payment to all producers * * * of uniform prices for all milk so delivered irrespective of the uses made of such milk by the individual handler." 7 U.S.C. 608c(5)(B)(ii), emphasis added. Adoption of utilization factor for purposes of computing the nearby differential in no way violates that mandate; no consideration is given to the utilization "by the individual handler" of a nearby producer's milk in determining the differential due him; all that is considered is the use made of all milk in the marketing area

by all participating handlers. In short, location, not utilization, the is/critical criterion.

Indeed, as promulgated in 1938, the order provided for adjustments in favor of milk produced near the market without regard to marketwide utilization. See 3 F.R. 1945, 2100. With the expansion in 1957 of the New York order to embrace the areas of New Jersey and upstate New York, the utilization factor was added. Having determined that producers nearby the market center should continue to receive a differential -- the reasonableness of this determination is demonstrated below (infra pp. 39-46)-- the Secretary was desirous of incorporating a safeguard for the protection of non-nearby producers. Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (hence they received more for their milk than did producers located more distant to the center of consumption); inclusion of their sales within the blend results, therefore, in an increase of the uniform price. The nearby differential is intended to compensate partially those producers for the added value they bring into the pool for the benefit, in the main, of non-nearby producers. However, the Secretary correctly realized that as Class I utilization increases marketwide the amount of benefit conferred upon the pool by nearby producers declines. Hence, he set the nearby differential at rates varying inversely with the percentage of Class I milk in the pool

Furthermore, an unlimited nearby differential not tied to utilization might encourage qualifying producers to increase production without regard to demand. The utilization factor protects non-nearby producers such as the appellants since it operates as a limitation to the nearby differential, not as a factor of eligibility; plainly it does not violate any statutory admonition.

B. THE SECRETARY'S CONTEMPORANEOUS CONSTRUCTION OF 7 U.S.C. 608c(5)(B)(c) AS PERMITTING NEARBY DIFFERENTIALS IS NOT ONLY ENTITLED TO GREAT WEIGHT, IT HAS BEEN APPROVED JUDICIALLY AND RATIFIED BY CONGRESS

1. 7 U.S.C. 608c(5)(B)(c) was first enacted in 1935 by amendment to the Agricultural Adjustment Act of 1933. See 49 Stat. 753. Within three years, this milk marketing order was promulgated. 3 F.R. 1945. Article VII, section 2 thereof provided (3 F.R. 1949, emphasis added):

> Transportation and location differentials. -- The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI.

Article IV, Sec. 3 provided for a transportation differential equivalent in substance to that now provided for in 7 C.F.R. 1002.71(a). The underscored portion is the predecessor of both the present direct delivery and nearby differentials. Handlers were required to increase the blend price by 25 cents per hundredweight for producer

milk delivered to plants in the nearby New York and New Jersey counties, Litchfield County, Connecticut, Berkshire County, Massachusetts, and specified towns in Ulster County, New York. Twenty cents of that adjustment, the nearby differential portion, ultimately was paid out of the pool in recognition of the added value to the pool of the nearby milk. See Art. VI, sec. 8, 3 F.R. 1949. While the operative factor for eligibility under the 1938 order was the location of the plant and under the 1957 order it is the producer's location, as a practical matter both orders were timely endeavors to effectuate the statutory directive that location differentials be predicated on the place of delivery. As we show above (supra, p.24),in 1938 delivery was effected at the handler's plant; today it is accomplished at the farm itself. Thus, as the Secretary observed, to realize the 1938 objective today -- the payment of a differential to nearby producers who "deliver" to nearby plants -- a change in terminology was required. See 22 F.R. 4213. But as a practical matter the beneficiaries of the nearby differential provided for both in the 1938 and 1957 orders are one and the same -- producers who are located nearby the market center and who serve that center.[15/]

15/ It is interesting that although under the 1938 order the differential was keyed to the location of the plant at which delivery was made, the Market Administrator, in his annual reports for the New York Metropolitan Milk Marketing Area, listed the differential as "premiums to nearby producers." See, R. Ref. 29. As a practical matter, because of the cumbersome method in which milk was transported (in cans which in turn were delivered to handlers) delivery could only be effected at a plant located reasonably close to the farm.

The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February 7, 1936 -- less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for "the locations at which delivery of such milk is made." See 2 F.R. 1331. In relevant part that order provided (2 F.R. 1333):

> SEC. 4. Location Differentials. -- The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:
>
> 1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.
>
> 2. With respect to milk delivered by a producer to a handler's plant, located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.
>
> 3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.
>
> 4. With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

Paragraphs 1 and 2 are comparable to the transportation differential provided for in 7 C.F.R. 1002.71(a); paragraphs 3 and 4 are the equivalent of the nearby differentials provided for in 7 C.F.R. 1002.71(b).

Indeed, the nearby differential provisions of the 1936 Boston and 1957 New York-New Jersey orders are, in substance, identical in purpose and effect: (1) Both orders authorize payments to producers based solely upon the location of the producers farm, the only distinction being that under the Boston order there was but one basing point (the State House in Boston); the New York - New Jersey order has several basing points. (2) Under both orders the nearby differential payment is made out of the producer's pool and results in a reduction of the uniform blend price that would otherwise be paid to non-nearby producers. (3) Both orders divide the nearby area into zones with the producers stiuated in the closer zones being entitled to larger adjustments. The only differences in this connection (except, of course, the rates of payment) relate to the number of zones and the methods used in zoning producer farms. The Boston Order provided for two zones (0-40 miles and 40-80 miles from the State House); the New York order provides for eight zones. In addition, under the New York order, farms in certain counties are placed within zones which do not reflect their actual mileage from a basing point. But the essential similarity remains; both orders establish zones and provide for differential payments which reflect the proximity of the zone to the basing point. (4) Finally, both orders employ a utilization factor with the object of reducing, or eliminating, the nearby differential when marketwide fluid utilization is high. Under the Boston Order the differential to producers whose farms were located in the 0-40

mile zone was to be "46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19." 2 F.R. 1333. Under the New York Order, the rates of payment decrease as the percentage of marketwide Class I utilization increases; there is no nearby differential when 80% or more of all utilization in the market is in fluid form. Both orders recognize that the benefit nearby producers confer upon the market, and in turn upon all producers servicing that market through a higher blend price, decreases as fluid utilization increases marketwide.

Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed that provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight. Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90; Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315; United States v. American Trucking Associations, 310 U.S. 534, 549.

Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and

conditions in addition to those expressly stated as are "incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) * * *." That provision reflects congressional recognition of the fact that in devising a particular form of regulation the Secretary must be afforded wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 614. See also Stark v. Wickard, 321 U.S. 288, 210; Mitchell v. Budd, 350 U.S. 473, 480; Queensboro Farm Products v. Wickard, 137 F. 2d 969, 977 (C.A. 2). Even if the nearby differentials provided for in the 1957 New York and 1936 Boston orders are not squarely authorized by 7 U.S.C. 608c(5)(B)(c), they certainly are "incidental to, and not inconsistent with" that provision. 7 U.S.C. 608c(7)(D).

2. As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is identical to a similar provision in the 1936 Boston Order -- both provisions were promulgated on the basis of the same statutory provision; both make the location of the producer's farm the critical eligibility requirement; both finance the differential out of the marketwide pool; and both vary the differential with the marketwide value of all milk. This identity is of particular significance since the 1936 Boston Order has received both judicial approval and congressional ratification.

a. The nearby differential provision of the 1936 Boston Order was the subject of judicial scrutiny in Green Valley Creamery v. United States, 108 F. 2d 342 (C.A. 1), a suit by the United States seeking a mandatory injunction directing certain handlers in the Greater Boston Area to comply with the Marketing Order. "[T]hree provisions of the Order [were there] asserted to be unauthorized by the Act" (108 F. 2d at 344) -- the minimum pricing provision, the method of computing the blend or uniform price, and the nearby differential. Each assertion was rejected; the court's rationale as to the last being of particular relevance (108 F. 2d at 346):

> Appellants further challenge the validity of certain differentials provided for in Article VIII, Section 4, paragraphs 3 and 4, of the Order. The section is set forth in the footnote. It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c(5)(B)(ii)(c) of the Act, which authorizes only differentials based upon "the locations at which delivery of such milk is made." There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII may be said to prescribe differentials having relation to locations at which deliveries are made. This argument

need not be labored, however, for the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

To be sure, as the appellants here emphasize (App. Br. pp. 57-61), the First Circuit suggested that the nearby differential provided for in the Boston order alternatively could be authorized as a "market" differential and questioned the complainants' standing. But it cannot be doubted that the court first faced up to the same statutory attack made here and its reasoning, if not controlling, is highly persuasive. At the very least it buttresses the Secretary's similar construction of 7 U.S.C. 608c(5)(B)(c).

b. Moreover, as the court in Green Valley properly observed (108 F. 2d 346), Congress too has approved of that construction. With the enactment of the Agricultural Marketing Agreement Act of 1937 -- which was a re-enactment (with some amendments and additions) of the Agricultural Adjustment Act of 1933, to which 7 U.S.C. 608c had been added in 1935 (495 Stat. 753) -- Congress expressly "ratified, legalized and confirmed" existing milk marketing orders (50 Stat. 249):

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with any such agreement, license, or order which has been executed, issued, approved or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized and confirmed. [Emphasis added.]

The nearby differential provision considered in Green Valley was contained in the original Boston Order effective February 9, 1936; as such it "expressly [was] ratified, legalized and confirmed."

C. THE DECISION TO PROVIDE A NEARBY DIFFERENTIAL WAS PREDICATED ON A REASONABLE EXERCISE OF ADMINISTRATIVE JUDGMENT: IN NO WISE ARE NON-NEARBY PRODUCERS ARBITRARILY DISCRIMINATED AGAINST

The appellants' principal contention appears to be not that nearby differentials violate the statute, but that they result in an arbitrary and discriminatory benefit to nearby producers at the expense of non-nearby producers (App. Br. pp. 34, 42-46). In Point II (infra pp. 39-46) we show that the Secretary's decision to continue nearby differentials in the New York milk marketing area is amply justified by the facts adduced at the promulgation hearing. We show here that, assuming the propriety of those findings, nearby differentials in general are reasonable and in no wise discriminatory. To do this we need but look to the Secretary's rationale (22 F.R. 4213-4214):

> Historically, the percentage of the milk produced nearest to metropolitan New York-New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with

> equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.
>
> In order to provide benefits of more nearly equal value both to nearby and distant producers, some form of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

The Secretary's judgment to provide for nearby differentials in the 1936 Boston Order was predicated on very similar findings; findings which in the First Circuit's view established the reasonableness of that location differential. Green Valley Creamery v. United States, 108 F. 2d 342, 346.

Plainly, therefore, if the Secretary's findings have substantial evidentiary support it is frivolous to suggest, as do the appellants (App. Br. p. 42), that "this nearby differential is devoid of any element of service or value and the appellee has suggested none;" that non-nearby producers are required to relinquish, in favor of nearby producers, higher blend prices without receiving a quid pro quo (App. Br. pp. 42-46). Nearby producers are afforded a differential for the very reason that their participation in the pool inures to their detriment while benefiting non-nearby producers who thereby enjoy a blend price that is computed on the basis of a higher fluid utilization. The differential represents an endeavor equitably to temper the economic advantage

relinquished by nearby producers under regulation; it is designed to insure that regulation will not unreasonably discriminate against nearby producers.

Finally, it is, we submit, not without significance that the amici briefs filed by interested associations -- the memberships of which are composed of both nearby and non-nearby producers -- favor the differential. The appellants attempt to discount that fact by suggesting that it is only "the small and active minority who propose to keep on exacting such differential payments from their fellow producers, preferably with as little publicity as possible" (App. Br. p. 40), who are in fact being represented. By way of response, we need but refer to these briefs filed.[16/] Neither endeavors to obscure the fact that the majority of their respective memberships do not enjoy nearby differentials; yet they knowingly argue in favor of those adjustments out of economic self-interest, not altruism.[17/] Plainly, non-nearby producers

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16/ The brief amicus filed on behalf of the New England Milk Producers' Assoc., Connecticut Milk Producers Assoc., Local Dairyment's Cooperative Assoc., and the Producers Dairy Company, and the brief presenting the views of the Dairymen's League Cooperative Assoc. and the United Milk Producers Cooperative Assoc. of New Jersey.

17/ See, for example, p. 5 of the Brief for the New England Milk Producers' et al:

> Farmers in nearby areas could establish their own milk routes or dairy stores for the sale of their milk in competition with established handlers. To the extent that nearby farmers do establish their own milk routes or dairy stores for the sale of their own production, the sales of Class I milk which they make, are not included in the determination of the blended price to be paid to producers. To this extent (Cont'd)

receive a quid pro quo.[18]

17/ (Cont'd)

> the blended price paid to the non nearby producer is diminished. It is to the advantage of the non nearby producer to have included within the pool the maximum quantity of Class I sales. Any exclusion of Class I sales in the market area operates to a disadvantage of the non nearby producer.

Producer-handlers -- producers who distribute only their own production -- are not subject to pricing regulation under the New York order (see supra, p. 9). Accordingly, non-nearby producers have a direct interest in inducing nearby producers, who enjoy a higher Class I utilization, to elect to remain regulated. See Green Valley Creamery v. United States, 108 F. 2d 342, 346.(C.A. 1).

18/ Appellants concluding argument -- that nearby differentials constitute trade barriers similar to the compensatory payment scheme declared violative of 7 U.S.C. 608c(5)(G) in Lehigh Valley Cooperative v. United States, 370 U.S. 76, -- is equally baseless. Lehigh involved the validity of the Secretary's conditioning the sale in the New York - New Jersey marketing area of milk produced outside of that milkshed by requiring non-pool handlers to pay a compensatory payment. Payment was a condition precedent to the sale of fluid milk in the New York - New Jersey milkshed. The nearby differential in no wise restricts the marketing of milk produced anywhere. Indeed, it encourages non-nearby producers to stimulate a higher Class I utilization, for the higher that utilization marketwide, the lower the nearby differential.

II

THE RECORD AMPLY JUSTIFIES THE INCLUSION OF NEARBY DIFFERENTIALS IN THE NEW YORK-NEW JERSEY MILK MARKETING ORDER.

7 U.S.C. 608c(4) provides that "after such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing, * * * that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of" the Act. If his conclusions are authorized by law and his findings supported by substantial evidence the Secretary's determination must stand. United States v. Lewes Dairy, Inc., 337 F. 2d 827 (C.A. 4), certiorari denied, 379 U.S. 1000; Freeman v. Hygeia Dairy Co., 326 F. 2d 271 (C.A. 5); New York State Guernsey Breeders' Co-op. v. Wickard, 141 F. 2d 805 (C.A. 2), certiorari denied, 323 U.S. 725. In Point I (supra, pp.21-38) we demonstrated that the Secretary has the statutory authority to provide for nearby differentials. We now show that his finding that in 1957 such differentials were appropriate in the New York-New Jersey Milk Marketing Order has substantial record support.

On May 25, 1956, the Secretary first announced that a promulgation hearing would be held (21 F.R. 3537). The hearing commenced on June 18, 1956 and, after 102 days of testimony, the compilation of a 15,617 page record and the

receipt of 217 exhibits, was brought to a close on March 29, 1957 (R. Ref. 6, p. 2). The decision to continue nearby differentials, the zones and rates of payment, and the formula which adjusts the differential to market-wide utilization, were the product of considerable consideration. After the Secretary's decision was issued, it was approved by more than two-thirds of the producers voting in the referendum. On several occasions since 1957, minor changes have been made to the nearby differential provision at the suggestion of both producers and handlers; at no time, however, has it been suggested that the differential be deleted. If the appellants are of the view that the economic situation has now changed to the point where it is no longer appropriate to afford nearby producers a differential, it is open to them to request an amendatory hearing. Having failed first to seek administrative redress we do not think appellants may now be heard to complain. In any event, since the nearby differential is certainly justified by the 1957 administrative record, they have no complaint.

It is, by stipulation, agreed that the portions of that record which bear at all on the nearby differential issue have been collected in the two volume compilation certified in the court below and included in the record on appeal. Eight persons testified with regard to nearby differentials and, with the exception of two lay witnesses,[19] all favored their retention.

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[19] Messrs. Steck and Wright, R. Ref. 22 and 26.

Profs. Johnson and Spencer, Drs. Westcott and Young, and Messrs. Benham and Brown all urged that the differentials were economically justified and indispensable for the protection of nearby producers. As Dr. Johnson, Professor of Agricultural Economics at the University of Connecticut testified, nearby differentials were incorporated in this order in 1938 to continue, under regulation, the established practices of the cooperatives and larger handlers (R. Ref. 19, p. 308); the differential is essential in order to reflect the higher Class I utilization which nearby producers contribute to the pool (id. at p. 310); and New Jersey producers delivering to unregulated plants traditionally have enjoyed prices substantially higher than the blend prices during the pre-1957 period (id. at 309-310). Dr. Spencer, a Cornell University professor, agreed that nearby differentials were economically justified because of the "[m]ore desirable seasonal pattern of production in the nearby area [and the] [g]reater convenience of nearby milk to dealers, including earlier arrival at city plants; more dependable delivery to the market with less risk of delay in transit; easier, more efficient supervision of farms and plants; [and] opportunity for direct delivery from farms to city plants, especially in tanks" (R. Ref. 27, pp. 15,002-15,003). Dr. Young, noting that "milk from nearby farms has historically been utilized primarily as Class I or fluid milk" (R. Ref. 23, p. 12,538) -- a representation which he documented with statistical evidence -- emphasized the need to protect the "legitimate interests" of nearby producers (id. at 12, 541):

> If these interests are not protected, then the nearby producers, through the equalization of sales process, will have their prices drastically reduced and the money which they have received will be taken from them and paid out to distant producers.
>
> Location differentials such as we have proposed are necessary to offset the heavy equalization payments so that there may be a distribution of the proceeds from the sales of fluid milk that will equitably protect the legitimate interest of all producers. 20/

Finally, Dr. Westcott, too, agreed that the extra value of nearby milk exceeded the savings in transportation alone (R. Ref. 21, p. 12,341); it is a supply of milk that handlers are desirous of obtaining for it is "generally speaking, fairly even * * * [d]oesn't build up and flood him when he doesn't want it * * * [and] is available to him when there are storms or difficult shipping problems. It is a supply of milk of good flavor * * * [and] of good color." Id. at 12,389. Accordingly, it was, to Dr. Westcott, "a foregone conclusion * * * that the milk from these nearby producers in New York state and in New Jersey and in Pennsylvania goes largely to fluid use." Id. at 12,374. That being the case, pooling plainly inures to the benefit of non-nearby producers. Id. at pp. 12,375, 12,391-12,393, 14,267-14,268.

20/ See also the testimony of Mr. Stanley Benham who characterized the nearby differential as but "a partial compensation to the dairymen living in those nearby production areas for their loss of benefit from the very high fluid utilization on the milk produced on their farms, through equalization with the more distant dairymen * * *." R. Ref. 24, pp. 12,713-12,714.

Apart from the expert testimony, the record is replete with statistical support for the Secretary's determination in favor of nearby differentials. For example, there is evidence demonstrating that prior to the extension of the order in 1957 the milk of New Jersey producers pooled under the New York order commanded a premium over and above the New York blend price -- between 1941 and 1945 the extra premium averaged nine cents per hundredweight, and, between 1946 and 1950, twenty-four per hundredweight, and, between 1951 and 1955, thirty-three cents per hundredweight. Those premiums over the blend prices were paid in addition to all other differentials (including transportation and location). R. Ref. 32, p. 3, table 1. See also, R. Ref. 36. Moreover, milk produced in New Jersey but not priced under the New York order commanded even higher prices. In 1955 Grade "B" milk prices in all of New Jersey averaged approximately sixty-one cents higher than the New York blend price even after the allowance of both a transportation differential (computed on the 61-70 mile zone) and the nearby differential (which, by virtue of the 1938 order, was then twenty-five cents per hundredweight). R. Ref. 33, p. 28. Further, the record reflects that between 1946 and 1955 in two representative New Jersey counties, Warren and Sussex, premiums were paid on nonregulated milk over and above the prices paid on regulated milk distributed under the New York order (R. Ref. 32 p. 7, table 5). A second study compared the difference in price between milk produced in certain other New Jersey counties but not priced under

the New York order with the New York blend price (including all differentials); in all instances higher prices were paid for the New Jersey milk (R. Ref. 30, tables 20-23).

With respect to Northern New York State (an area which also had not been regulated under the order until 1957), the record reveals that milk prices in the urban centers now enjoying differentials were consistently in excess of the blend price between 1948 and 1955 -- the difference ranged from a low of twenty-five cents per hundredweight to a high of forty-eight cents. R. Ref. 34, table 1; see also R. Ref. 35, tables 13 and 15.

Finally, in the New York milkshed nearby producers by far enjoyed a higher fluid utilization than did non-nearby producers. The following table, which is a composite of statistical findings contained in two of the certified record references (R. Ref. 28 and 29), clearly establishes that fact:

Percentage of milk utilized as Class I in New York Market and in the 1-75 and 1-125 mile area. 21/

21/ Sources: Total market Class I percentage for years 1940-1949 calculated from Exhibit No. 13, Table 4, p. 23 and Table 7, pp. 28-30 (R. Ref. 28); for years 1950-1955, Exhibit No. 14, Annual Bulletin 1951 pp. 18 and 19, Annual Bulletin 1953, pp. 20 and 21, Annual Bulletin 1955 pp. 18 and 19 (R. Ref. 29).

Class I percentage calculated for the 1-75 mile area and for the 1-125 mile area for the years 1940-1949, from Exhibit No. 13, Tables 63 and 64, pp. 83-90, (R. Ref. 28), and for the years 1952-1955, from Exhibit No. 14, Annual Bulletin 1952 p. 13; Annual Bulletin 1953, p. 14, Annual Bulletin 1954, pp. 13 and 14, Annual Bulletin 1955, p. 14 (R. Ref. 29).

1940 -1955

Year	Class I Percentage: Total Market	1 - 75 Mile Area	1 - 125 Mile Area
1940	45.03	88.65	87.55
1941	46.68	90.64	88.69
1942	47.87	94.97	92.34
1943	56.56	97.53	94.73
1944	58.13	98.23	94.28
1945	57.95	97.63	94.64
1946	66.38	98.32	96.40
1947	61.54	97.34	96.88
1948	61.40	97.84	97.00
1949	53.44	94.89	94.78
1950	51.59	(data unavailable)	
1951	52.25	(data unavailable)	
1952	51.35	96.57	94.18
1953	48.57	94.96	94.39
1954	47.27	94.48	94.48
1955	49.96	93.58	92.51

From the foregoing it is to be observed that milk produced in the entire State of New Jersey and that produced within a radius of 125 miles from New York City was used principally for fluid purposes prior to 1957; further, the production closest to metropolitan New York realized the greater share of the fluid market. Hence, the Secretary geared nearby differentials to a

radial zoning scheme, with the more proximate producers enjoying the higher adjustment. And, lest a straight mileage basis exclude areas where producers traditionally have enjoyed high fluid utilization, he departed from the radial scheme and made producers within those areas as well eligible for nearby differentials. It might be that another plan would be as equitable, would work as well; but certainly that selected by the Secretary is reasonable and is predicated on findings that are amply supported by the administrative record.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, et seq., provides in pertinent part:

> Section 608c. Orders regulating handling of commodity -- Issuance by Secretary.
>
> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.
>
> * * * * *
>
> Notice and hearing.
>
> (3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.
>
> Finding and issuance of order.
>
> (4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D)Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

Terms common to all orders.

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

BRIEF ON BEHALF OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION, CONNECTICUT MILK PRODUCERS ASSOCIATION, LOCAL DAIRYMEN'S COOPERATIVE ASSOCIATION, INC., AND PRODUCERS DAIRY CO. AS AMICI CURIAE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,801

LORTON BLAIR, *et al.*,

Appellants,

v.

ORVILLE FREEMAN, Secretary of Agriculture
of the United States of America,

Appellee.

APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE QUESTIONS INVOLVED

The Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937 as amended, has issued an order regulating the handling of milk marketed in the New York-New Jersey marketing area The questions are:

(1) Whether the Secretary has statutory authority to provide in his order for so-called "nearby differential payments" to be paid to milk producers under Section 1002.71 (b).

(2) Whether, assuming that the Secretary does have statutory authority, Section 1002.71 (b) is invalid by reason of its being arbitrary and capricious, without rational basis and lacking evidentiary support in the record of the rule making proceedings held by the Secretary in 1956-1957.

This brief is limited in its discussion to the first question, namely, the authority of the Secretary of Agriculture to include in milk orders provisions for so-called "nearby differential payments".

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PRELIMINARY STATEMENT

This brief, *Amici Curiae*, is filed pursuant to consent of all the parties to this case in accordance with Rule 18(j)(1) of the General Rules of this Court. Each of the organizations is a cooperative cor-

poration of milk producers organized under the Laws of the various States as hereinafter set forth.

New England Milk Producers' Association is a cooperative association of milk producers organized under the Laws of the Commonwealth of Massachusetts and having its principal place of business in Boston. It has a membership of approximately 6,000 milk producers whose farms are located in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York. Approximately 85% of the milk produced and marketed by said members is marketed in the Massachusetts-Rhode Island market under the provisions of Order #1, issued by the Secretary of Agriculture in accordance with the provisions of the Agricultural Marketing Agreement Act of 1937 as amended. Approximately 25% of the members of said Association whose milk is marketed in the Massachusetts-Rhode Island marketing area have their farms located in the so-called "nearby differential" area and receive the "nearby differential" payments provided by said Order.

This brief, on behalf of New England Milk Producers' Association, is filed with the approval of the Board of Directors of said Association, a majority of whom do not receive the so-called "nearby differentials".

Connecticut Milk Producers Association is a cooperative association organized under the Laws of the State of Connecticut and has its principal place of business in Newington, Connecticut, having a membership of approximately 1400 milk producers. The milk of its members is marketed in the Connecticut marketing area pursuant to Order #15 issued by the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act of 1937. (29 F.R. 12248; 29 F.R. 12454). Practically all of the members of said Association have their farms within the so-called "nearby differential" area.

Local Dairymen's Cooperative Association is a cooperative asso-

ciation of milk producers organized under the Laws of the State of Rhode Island and having a usual place of business in Providence in said State. It has a membership of approximately 600 members located in the States of Massachusetts, Connecticut and Rhode Island whose milk is primarily marketed in the Massachusetts-Rhode Island area under the terms and provisions of Milk Marketing Order #1. (29 F.R. 12236). All of the members of said association have their farms in the so-called "nearby differential" area.

Producers Dairy Co. has a membership of approximately 35 producers, all of whom have their farms located within the Commonwealth of Massachusetts whose milk is marketed in the Massachusetts-Rhode Island milk marketing area under the terms and provisions of Milk Marketing Order #1. All of said members have their farms located within the so-called "nearby differential" area.

The participation of Connecticut Milk Producers Association, Local Dairymen's Cooperative Association and Producers Dairy Co. in this brief is with the approval of their respective Boards of Directors.

Milk Marketing Order #1 contains provisions for so-called "nearby differentials", said provisions being a continuation of similar provisions which had been contained in Milk Marketing Order regulating the market of milk in the Greater Boston market which has been in effect since August 1, 1937. Said Order then known as Order #4 (2 F.R. 1331) was issued February 7, 1936 and remained in effect until August 1, 1936 when it was suspended by the Secretary of Agriculture following the declaration by the United States District Court for the District of Massachusetts that the Act was unconstitutional. *United States v. David Buttrick Co.*, 15 F. Supp. 655 (1936). This decision was reversed by the United States Court of Appeals for the First Circuit, 91 F.2d 66 (1937). The Order was reinstated as to certain of its provisions August 1, 1937.

Similar provisions were contained in the Lawrence-Lowell Milk Marketing Order which became effective February 1939 (15 F.R. 6581). This marketing area was consolidated into the Greater Boston-Massachusetts milk marketing area effective July 1, 1959 (24 F.R. 5429).

Similar provisions had been contained in the Milk Marketing Order regulating the marketing of milk in the Worcester, Massachusetts milk marketing area and had been effective since January 1, 1950 (14 F.R. 7224).

Similar provisions had been contained in the Milk Marketing Order regulating the marketing of milk in the Greater Springfield, Massachusetts marketing area and had been in effect since January 1, 1950 (14 F.R. 7217).

Similar provisions had been contained in the Southeastern New England Milk Marketing Order and had been in effect since January 1, 1959 (23 F.R. 8843).

Similar provisions were contained in the Connecticut Milk Marketing Order regulating the marketing of milk in the Connecticut milk marketing area which became effective April 1, 1959 (24 F.R. 1499).

The said Milk Marketing Orders regulating the marketing of milk in the Greater Boston, Massachusetts marketing area, Worcester, Massachusetts marketing area, Greater Springfield, Massachusetts marketing area, Southeastern New England milk marketing area were consolidated and merged into the Massachusetts-Rhode Island Milk Marketing Order effective as of October 1, 1964 (29 F.R. 12236).

The "nearby differential" provisions contained in the separate Milk Marketing Orders were carried over and included in the merged Massachusetts-Rhode Island Milk Marketing Order and are presently in effect. For many years prior to 1936 when the Boston milk order became effective, nearby location differentials existed and were paid

to milk producers in the areas close to the market. These nearby differentials were in addition to any differences in transportation costs.

These nearby differentials were justified on many grounds:

a. Nearby farms had a more uniform production pattern throughout the year. The quantity of milk produced on farms nearby the market was relatively even throughout the year. This was not the case on farms more distant from the market.

b. The nearby farms had greater accessibility to the market and milk could be delivered directly from the farm to the city plant without the intervention of a country plant, to which more distant farms had to deliver their milk in order that it might be properly cared for in its transportation to the city plant. Even today with improved transportation by tank truck, the usual rule in the more distant areas is to collect the milk in a farm pick-up tank truck and then transfer the milk to an over-the-road tank for transportation to the City.

c. A greater proportion of the milk from nearby farms is utilized for Class I or fluid milk purposes, whereas a greater proportion of the milk from more distant areas is utilized for manufacturing purposes.

d. Farmers in nearby areas could establish their own milk routes or dairy stores for the sale of their milk in competition with established handlers. To the extent that nearby farmers do establish their own milk routes or dairy stores for the sale of their own production, the sales of Class I milk which they make, are not included in the determination of the blended price to be paid to producers. To this extent the blended price paid to the non-nearby producer is diminished. It is to the advantage of the non-nearby producer to have included within the pool the maximum quantity of Class I sales. Any exclusion of Class I sales in the market area operates to a disadvantage of the non-nearby producer.

Milk being a highly perishable commodity, accessibility to market

and nearby location has a sales factor in its favor with the housewife as being fresher. This is true even today with improved methods of refrigeration and transportation.

Because of the foregoing, the nearby producer has received a differential in his favor. The more distant producer recognizes these factors as justification for such differentials.

The interest of the cooperative associations on whose behalf this brief is filed, is in support of the position of the Secretary of Agriculture that Section 608c (5) of the Agricultural Marketing Agreement Act (7 U.S.C. sec. 608c (5) *et seq.*) authorizes the Secretary of Agriculture to include in milk marketing orders regulating the marketing of milk, provisions for "nearby location differentials".

STATEMENT OF THE CASE

The statement of the case as it appears in the brief of the Appellee, the Secretary of Agriculture, is adopted for the purposes of this brief.

ARGUMENT

Section 1002.71 (b) Milk Marketing Order No. 2 Which Provides for So-called "Nearby Differential" Payments To Be Paid to Certain Milk Producers, as Set Forth in the Order Issued by the Secretary of Agriculture, Is Within the Authority Granted to Him Under the Agricultural Marketing Agreement Act (7 U.S.C. Section 608c (5)).

Section 8c (5) of the Act reads in part as follows:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the

> grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made . . . ." (7 U.S.C. sec. 608c (5), as amended by Public Law 89-321, § 101, 79 Stat. 1187, 7 U.S.C.A. sec. 608c (5) (B))

The milk industry in the United States has been described as being exquisitely complicated. *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969 (C.A. 2, 1943). In an attempt to solve the economic problems of this industry, regulations have been found necessary. States, through action of their legislatures during the period of the thirties, attempted, through the creation of regulatory authority, to establish minimum prices to be paid for milk to milk producers. Such legislation was determined to be constitutional. *Nebbia v. New York*, 291 U.S. 502 (1934). However, inasmuch as the milk consumed in large metropolitan centers moves in substantial amount in interstate commerce, the State legislation was ineffective to accomplish the purpose of the Act. *Baldwin v. Seelig*, 294 U.S. 511 (1935).

To deal with this problem, Congress under the Agricultural Adjustment Act amendments of 1935, Section 4 (49 Stat. 750), and later under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246) 7 U.S.C. sec. 601, *et seq.*, which as amended is now in effect, established a system for regulating the marketing of designated agricultural products including milk, insofar as they are in the current of interstate commerce, or burden, obstruct, or affect interstate or foreign commerce.

The purpose of the legislation was to promote and maintain orderly marketing conditions, avoid unreasonable fluctuation in supplies and prices, and insure a sufficient quantity of pure and wholesome milk to consumers. (7 U.S.C. sec. 608c (5) *et seq.*)

The statute and the regulatory scheme adopted by the Secretary, pursuant to the authority granted to him by the statutes, have been adjudicated to be constitutional. *United States v. Rock Royal Co-Opera-*

live, Inc., 307 U.S. 533 (1939); *H. P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939). These two cases describe in detail the economic background which impelled the Congress to adopt the legislation. The objectives which the legislation sought to achieve and the regulatory scheme adopted by the Secretary of Agriculture, pursuant to the statutory authority, provided for the classification of milk according to the uses to which such milk was put by the dealers or handlers to whom the producer delivered his milk, and provided uniform minimum prices to be paid by the handler for each use classification.

Under one plan, which the Act authorizes, each dealer made payment to the producer from whom he purchased milk, a blended price which reflected the quantity of milk sold by him or used by him in each use classification irrespective of the use to which any particular producer's milk was put.

The other plan, authorized by the statute, was to provide that each dealer should account to the Milk Administrator or the so-called "producer settlement pool" for the milk which he received from producers at the uniform minimum price established in the Order for each use classification. The total value of all the milk of all the dealers, according to the use classification and values of each, was then ascertained and an average blended price was determined by dividing the total quantity of milk delivered by all producers into the total value and each handler would then be required to pay to his producers this market-wide blended price.

In those cases where the handler's value, according to the use classification which he made of the milk delivered to him, was in excess of the market-wide average price, he was required to pay into the producer settlement fund or clearing house this excess amount and in those cases where the value of the milk at the minimum prices was below the amounts which the handler was required to pay to his producers at the market-wide blended prices, the producer settlement

fund would pay to such handler the amount necessary to provide the funds to make up his deficiency. In other words, the producer settlement fund acted as a clearing house through which each of the handlers of the market paid to his producers the market-wide average blended price.

In either case these prices as thus ascertained were subject to adjustments, for (1) volume, market, and production differentials customarily applied by the handlers subject to the order, (2) the grade or quality of the milk purchased, and (3) the location at which delivery of such milk or any use classification thereof was made to such handlers.

The provisions of Section 8c (5) (A) (B) of the Agricultural Agreement Act of 1937 were the same as had been contained in the Agricultural Adjustment Act Amendments adopted August 24, 1935. 49 Stat. 750, ch. 641 (7 U.S.C. sec. 602).

The design and purpose of those sections of the Agricultural Adjustment Act and Amendments of 1935 as later reenacted and amended by the Agricultural Marketing Agreement Act of 1937 was to follow the methods employed by cooperative associations of producers in their milk marketing operation prior to the enactment of the Agricultural Marketing Agreement Act. Senate Report 1241, 74th Congress, First Session, page 9.

The Order regulating the marketing of milk in the Greater Boston, Massachusetts market originally issued February 7, 1936 contained provisions for "nearby differentials" to be paid to producers. These provisions established two zones. One was the area within a radius of 40 miles from the State House in Boston, and the second was an area within a radius of more than 40 but less than 80 miles from the State House in Boston. Each succeeding Order issued by the Secretary regulating the marketing of milk in any of the New England markets and the present Massachusetts-Rhode Island Order contained provisions

for "nearby differentials" to be paid to producers substantially similar to those which were contained in the original Boston Order issued in 1936.

The attention of the Court is directed to Section 4 of the Agricultural Marketing Agreement Act of 1937 which provides that nothing in this Act shall be construed as invalidating any marketing agreement, license or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license or order which has been issued, approved, or done under the Agricultural Adjustment Act or any Amendments thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized and confirmed.

Thus, we submit the provisions for "nearby differentials" as contained in the Boston Order and continued in the Massachusetts-Rhode Island Order have been expressly ratified by the Congress.

The original Order #27 issued by the Secretary of Agriculture regulating the marketing of milk in the New York milk marketing area was originally effective in 1938. (3 F.R. 1945, 1957, 2100, 2102). Following hearings of which notice had been given and at which a great deal of testimony was received, Federal Milk Marketing Order #27 was amended, effective August 1, 1957 to include Up-State New York and Northern New Jersey. As originally issued Order #27 contained provisions for "nearby differentials". These provisions were amended in 1957 to reflect changes in the market situation which resulted from the expansion of the marketing area to include Up-State New York and the State of New Jersey. It is these provisions which are contested in this litigation.

The provisions of the New York Milk Order as originally issued which provided for special differentials of 20¢ on milk from certain counties located most favorably to the milk marketing area (Order #27,

Article VII, Section 2) were before the Supreme Court in *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 567, and were there held to be authorized by the Act and were sustained.

The "nearby differential" provisions as set forth in the Greater Boston, Massachusetts milk marketing area #4, amendment #1, were challenged in the case of *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342 (C.A. 1, 1939). This is the only case in which the validity of milk marketing order making provision for payment of differentials to nearby producers based solely upon the location of their farms in the marketing area has been decided by the Court. The Court held:

> "Appellants further challenge the validity of certain differentials provided for in Article VIII, Section 4, paragraphs 3 and 4, of the order. The section is set forth in the footnote. [cf. Sec. 4, et seq., above] It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c (5) (B) (ii) (c) of the Act, which authorizes only differentials based upon 'the locations at which delivery of such milk is made.' There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience shows, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo

> in this respect. Milk entering the Boston market from farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c (5) (B) (ii) (a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market." (108 F.2d at 346.)

The Congress by the enactment of the 1935 amendment to the Agricultural Adjustment Act and the reenactment and amendments thereto by the Agricultural Marketing Agreement Act of 1937, has confided to the Secretary of Agriculture a discretion as to the remedy to be employed to meet the policy declared to be the objective of the Act. The relation of remedy to policy is peculiarly a matter of administrative competence. *Fibreboard Paper Products Corporation v. National Labor Relations Board*, 379 U.S. 203, 216 (1964).

It is respectfully submitted that on the basis of the statutory provisions, as originally set forth in the 1935 amendments to the Agricultural Adjustment Act, the reenactment by the Congress in 1937 of those provisions which authorized the establishment of nearby differentials and the specific approval by ratification and confirmation of the provisions for nearby differentials in the Boston Federal Milk Order by Section 4 of the Agricultural Marketing Agreement Act of 1937 clearly and without question established the authority of the Secretary to include such provisions in milk orders issued by him.

CONCLUSION

We respectfully submit that the 1935 Amendments to the Agricultural Adjustment Act, the reenactment of those provisions relating to milk marketing orders by the Agricultural Marketing Agreement Act of 1937, the administrative interpretation by the Secretary and the specific ratification and confirmation of the orders issued prior to that action of Congress in 1937 and again in 1948 by the Act of July 3, 1948, c. 827, 62 Stat. 1258, support the authority of the Secretary to include "nearby differentials" in milk orders. The decision of the District Court in this respect should be affirmed.

Respectfully submitted,

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Brief Amici Curiae of Dairymen's League Cooperative Association, Inc., and United Milk Producers' Cooperative Association of New Jersey

United States Court of Appeals

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v.

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Appeal From the Decision of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

STATEMENT OF THE QUESTIONS PRESENTED

The questions presented are:

(1) Whether or not the Secretary of Agriculture in promulgating a milk order under the Act has statutory authority to adjust the uniform price paid to producers by a differential related to the location of the producer's farm with respect to the marketing area.

(2) Whether the Court below erred in concluding that the provisions of § 1002.71(b) of the Order are based on substantial evidence before the Secretary.

(3) Whether a nearby differential on milk admittedly and lawfully subject to full regulation by the Secretary of Agriculture constitutes a trade barrier and is prohibited by § 8c(5)(G) of the Agricultural Marketing Agreement Act, as amended, as construed by the Supreme Court of the United States in *Lehigh Valley Cooperative Farmers, Inc., et al. v. United States*, 370 U.S. 76 (1962).

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Brief Amici Curiae of Dairymen's League Cooperative Association, Inc., and United Milk Producers' Cooperative Association of New Jersey

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I. PRELIMINARY STATEMENT

This brief *amici curiae* is being filed on behalf of Dairymen's League Cooperative Association, Inc., and United Milk Producers' Cooperative Association of New Jersey pursuant to Rule 18(j)(1). Letters from the Appellants and Appellee consenting to the filing of this brief by the *amici curiae* are on file with the Court.

Dairymen's League Cooperative Association, Inc., is a corporation organized under the cooperative laws of the State of New York with approximately 9,100 members in

the States of New York, Pennsylvania, New Jersey, Vermont, Massachusetts and Connecticut, whose milk is delivered under and pursuant to Federal Milk Marketing Order No. 2 (7 CFR § 1002, hereinafter referred to as the "Order"). United Milk Producers' Cooperative Association of New Jersey is a federation of 13 cooperatives with approximately 1,000 members in the States of New Jersey, Pennsylvania and New York. The milk of these producers is also regulated by the Order.

Together, the *amici curiae* represent some 10,100 producers or about 25% of the approximately 40,000 producers whose milk is regulated by the Order.

The *amici curiae* have a direct interest in this litigation by reason of the fact that their members receive a substantial portion of the payments under § 1002.71(b) of the Order. Pursuant to § 1002.71(b) approximately $1,103,760 was paid in the calendar year 1965 to producers who are members of United Milk Producers' Cooperative Association of New Jersey and approximately $940,445 was paid to the producers who are members of Dairymen's League Cooperative Association, Inc. Such payments aggregate $2,044,205 or about 46% of the total payments made during 1965 to producers supplying the marketing area under the Order.

Amici curiae represent a cross-section of the producers whose milk is subject to regulation under the Order. Some 373 producers who are members of the Dairymen's League Cooperative Association, Inc., are located within the 1 to 50 mile zone specified in § 1002.71(b) of the Order and 1,181 are within the 51 to 120 mile zone. These are the producers who received payments of $940,445 referred to above. In addition, the League represents 7,577 producers whose milk is regulated by the Order but who are beyond the 120 mile zone and who are not, therefore, qualified under § 1002.71(b) to receive the payments in question. Notwithstanding the fact that a large number of its members under the Order are not entitled to receive the nearby differential, the

League has consistently supported the Order provisions calling for such payments in the firm belief that they are fair and reasonable and promote orderly marketing in the New York-New Jersey Milk Marketing Area. The decision to support the Appellee in this controversy was the decision of the Affiliated Board of Directors of the League, composed of producers from all sections of the marketing area.

Amici curiae participated in all hearings held by the Secretary of Agriculture in 1955 and 1956, during which the nearby differential provisions of the Order were considered.

II. STATEMENT OF THE CASE

For the purpose of this brief the *amici curiae* adopt the statement of the case set forth in the brief for the Appellee, the Secretary of Agriculture of the United States.

III. SUMMARY OF ARGUMENT

The adjustment to the uniform blend price payable to producers with respect to milk from designated areas required by § 1002.71(b) of the Order (hereinafter referred to as the "nearby differential") is authorized by § 8c(5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (50 Stat. 246, as amended, 7 USC § 601 et seq., hereinafter referred to as the "Act").

The Act requires that certain terms and conditions be included in orders regulating the marketing of milk. Thus, the Secretary of Agriculture is required by § 8c(5)(A) to classify milk in accordance with the form in which or the purpose for which it is used and to establish uniform minimum class prices. The Secretary is also required by § 8c (5)(B) of the Act to provide for the payment of a uniform blend price to producers for all milk delivered to handlers irrespective of the uses made of such milk by the individual handler to whom it is delivered.

The Act permits adjustments in minimum class prices or in the uniform blend price to producers for "volume, market and production differentials" and differentials for "location at which delivery of such milk is made". The Supreme Court of the United States upheld differentials based on nearness of the farm to the marketing area under § 8c(5)(A) of the Act in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). Since the language permitting adjustments under § 8c(5)(A) is also found in § 8c(5)(B) of the Act, it follows that the Secretary has authority to make the nearby differential adjustment in computing the uniform blend price to producers under § 8c(5)(B).

In *Green Valley Creamery* v. *United States*, 108 F.2d 342 (C.A. 1, 1939), the nearby differential provisions of the milk order applicable to the Greater Boston Area were upheld as authorized under § 8c(5)(B) of the Act. While the amount and form of the nearby differential was different from that now before the Court, the legal issue was the same and the decision of the Court in the *Green Valley* case should be followed here.

The provisions of the Order now being contested were promulgated only after extensive hearings by the Secretary. The Secretary found that the producers nearer the market have been able to command higher prices than those more distant and that the differential is more than can be accounted for by transportation cost alone. (22 F.R. 4213) The Secretary further found that the nearby differential is needed to provide benefits of more equal value both to nearby and distant producers. The findings of the Secretary are amply supported by the evidence and the District Court so held.

The variation in the amount of the nearby differential on the basis of relative percentage of fluid milk in the pool is consistent with its purpose. Since the objective is to compensate the nearby producer to some extent for the loss he

suffers through pooling, it is only reasonable that the nearby differential should vary inversely with the amount of fluid utilization in the pool. Such a sliding scale affords protection to the more distant producers such as Appellants and they should not be heard to complain.

The sliding scale does not violate the requirement that prices be fixed irrespective of the use of milk by the individual handler. Under the Order the differential is fixed according to the location of the farm. The variation in amount is relative to the fluid utilization in the entire marketing area and the particular use the handler makes of milk delivered to him by a producer does not set the price to that producer.

The nearby differential is not prohibited by § 8c(5)(G) of the Act. The reliance of the Appellants on the decision of the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc., et al.* v. *United States*, 370 U.S. 76 (1962), is misplaced. There the Court was not dealing with the determination of the price of fully regulated milk but with a payment levied on milk from outside the normal source of supply for the marketing area. The Supreme Court specifically recognized that different issues would be presented where, as here, the Secretary has imposed full regulation.

IV. ARGUMENT

A. THE DIFFERENTIAL PRESCRIBED BY § 1002.71(b) OF THE ORDER IS AUTHORIZED BY THE ACT.

Regulation of the milk industry under the Act has been described as an "exquisitely complicated" subject. *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969, 974 (C.A. 2, 1943). It is believed that a brief statement as to reasons for such regulation will be of help to the Court in resolving the issues before it. In this connection, reference is made to an informative article by Neil Brooks, Assistant General Counsel of the U. S. Department of Agriculture, entitled "The Pricing Of Milk Under Federal Marketing Orders" (26 Geo. Wash. Law Rev. 180 (1958)).

Milk regulation is necessary because of several factors: For one thing, milk is a highly perishable product which precludes the farmer from storing it pending his bargaining with the dealer for a satisfactory price. Moreover, there is a wide fluctuation in the volume of production between the flush Spring and Summer season and the Fall and Winter months. Variation may run as high as 100% between the high and low point of the year. Notwithstanding this, the demand for milk by the public is fairly constant throughout the year, thus producing a surplus in periods of highest production. The farmer cannot adjust production to meet this demand but must maintain his dairy herd at a size sufficient to meet the demand for milk even in the Fall and Winter months of low yield.

The economic value of milk is determined by its utilization. Thus, milk used for fluid consumption by the public commands the highest price. Milk in excess of that needed for fluid consumption is used for manufacturing into cheese, ice cream, and other dairy products. The price of surplus milk is substantially lower than the price of milk to be used for fluid consumption.

Because of these factors the competition for the fluid market became intense and fraught with cutthroat practices. Regulation was first attempted by the farmers themselves banding together in the form of cooperatives to bargain on a collective basis with the dealers. In the 1930's the State of New York enacted regulatory legislation fixing minimum purchase prices to be paid all milk producers for their milk. The validity of such regulation was upheld by the Supreme Court of the United States. *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Hegeman Farms Corporation* v. *Baldwin*, 293 U.S. 163 (1934). However, in 1935 the Court held that the state acting alone lacked power to prohibit within its borders sales of milk produced outside of New York State and purchased from producers at less than the minimum prices fixed for purchasers from producers in New York State. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

The decision rendered an isolated state program for an interstate milk marketing area impracticable.

In order to remedy this situation Congress enacted the Agricultural Marketing Agreement Act of 1937. Congress, so far as here relevant, designed the Act to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish stated price levels for farmers (Act, § 2(1) and § 8c(18)) and provide an orderly flow of the supply thereof to market and to avoid unreasonable fluctuations in supplies and prices (Act, § 2(4)). The objectives of the Act so far as milk is concerned are to be carried out through orders of the Secretary. The Act authorizes the Secretary to classify pool milk according to its use and to prescribe a minimum class price for each such class use. (Act, § 8c(5)(A)) The Act further authorizes the Secretary to make provision for the payment of a uniform blended pool price to producers irrespective of the class use made of a particular farmer's pool milk. (Act, § 8c(5)(B)) The accomplishment of minimum pricing and payment of uniform prices to producers is effected through pooling all fully regulated milk. (Act, § 8c (5)(C)) The programs are to be embodied in milk orders for marketing areas established on a regional basis. (Act, § 8c(11)(A))

Pursuant to the Act, the Order provides for a classification of milk according to its various uses (7 CFR § 1002.37) and establishes minimum prices for each use classification (7 CFR § 1002.40). The Order further provides for a producer settlement fund, commonly referred to as the "equalization fund" (7 CFR § 1002.75). The equalization fund is the heart of the regulatory scheme. Through the mechanism of the fund all regulated milk is pooled and the uniform blended pool price determined and paid as required by § 8c(5)(B)(ii) of the Act. The legality of the equalization fund was considered and upheld in *United States* v. *Rock Royal Co-Operative, Inc., et al., supra.*

Briefly, the computation of the uniform price paid to producers is as follows:

> "The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund." (*Grant* v. *Benson*, 97 App. D.C. 191, 193, 229 F.2d 765, 767 (C.A. D.C. 1955), cert. den. 350 U.S. 1015)

The present controversy centers on the determination of the uniform price to producers under § 1002.71(b) of the Order requiring the nearby differential adjustment in such uniform price with respect to milk from certain farms within designated zones and areas. The nearby differential is paid to qualified producers through the operation of the equalization fund.

The statutory authority for the nearby differential is found in § 8c(5) of the Act specifying the terms and conditions of milk orders. Among other things, the Order must, under § 8c(5)(A) and (B) contain terms:

> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for

each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time."

It should be noted that, while the Act provides for uniformity with respect to both the minimum class price to handlers under § 8c(5)(A) and the uniform blend price paid to producers under § 8c(5)(B), complete inflexibility is not required. Adjustments may be made under either (A) or (B) for certain items, including "volume, market and production differentials" and differentials for "locations at which delivery of such milk is made".

We submit that the Secretary's authority to prescribe a nearby differential under the provisions of the Act quoted above is supported by the decision of the Supreme Court of the United States in *United States* v. *Rock Royal Co-Operative, Inc., et al., supra.* The Court there considered the Order as effective September 1, 1938. At that time the Order provided for a total differential of 25¢ per hundredweight, 5¢ of which was paid by the handler (and was comparable to the present location differential under § 1002.71 (c) of the Order). The remaining 20¢ was an adjustment in the uniform price to producers for all pool milk received from producers from plants in certain designated areas near the marketing area. Then, as now, the 20¢ differential was paid through the medium of the equalization pool by giving the handler credit therefor in determining his obligation to the pool. The Order was held to be authorized by § 8c(5)(A) of the Act. (307 U.S. 533, 567)

It is true that in *Rock Royal* the Court was dealing with the differential as it affected the uniform class prices fixed by the Secretary under § 8c(5)(A) of the Act, while in the instant case the Appellants are attacking the differential as it affects the uniform price to producers under § 8c(5)(B) of the Act. However, the statutory adjustments to either price are the same and, if the language authorizes the Secretary to make an adjustment with respect to class prices under § 8c(5)(A), the identical language must certainly authorize the same adjustment when computing the uniform blend price under § 8c(5)(B).

The validity of the Order is also supported by the holding of the United States Court of Appeals for the First Circuit in *Green Valley Creamery* v. *United States, supra.* That case involved Federal Milk Order No. 4, governing the marketing of milk in the Greater Boston Area, which also contained a nearby differential in the uniform price for nearby producers substantially the same as under the New York Order. After noting the defendant's arguments that the differential was not a true "location" differential, the Court pointed out evidence before the Secretary indicating many reasons for the differential and concluded:

> " • • • Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market." (108 F.2d 342, 346)

The Appellants attempt to avoid the holding in the *Green Valley* case by citing *Wallace* v. *Ganley*, 68 App. D.C. 235, 95 F.2d 364 (1938). In the *Ganley* case the producers were questioning the constitutionality of the Agricultural Adjustment Act of 1933, as amended by the Act of 1935. The Court held that it was barred from any consideration of that issue and the producers had no standing to raise it because they had not shown a direct or threatened injury to their legal rights.

The *Green Valley* case was instituted by the Secretary of Agriculture to compel the defendants to comply with the provisions of the milk order applicable to the Greater Boston Marketing Area. The issue of constitutionality of the statute was not raised nor could it be raised. The argument was addressed to three provisions of the order which were asserted to be unauthorized by the Act, one of which was the validity of the nearby differential provision. The defendants were directly affected by this provision of the Order and the Court went to considerable length to answer their challenge. (108 F.2d 342 at p. 346) We submit, therefore, that what the Court had to say as to the validity of the differential provision challenged by the defendants is entitled to great weight.

The Appellants' allegation that the nearby differential is not authorized by the Act is contrary to both of the above-cited cases and is without merit.

B. THE PROVISIONS OF § 1002.71(b) OF THE ORDER ARE IN ACCORDANCE WITH THE ACT.

(1) The Secretary's Authority to Prescribe a Nearby Differential Includes the Authority to Prescribe Lesser Differentials as Conditions Vary.

The Appellants challenge the legality of § 1002.71(b)(3) of the Order on the ground that the nearby differential provided therein is a differential based on use of milk and that it, therefore, violates the requirement of uniformity of prices. In support of the alleged illegality, the Appellants point to the fact that the Order sets up a sliding scale based in part upon the percentage of fluid use of total milk pursuant to which no differential is paid when use becomes 80 percent fluid milk.

The obvious answer to this argument is that the differential is based on the location of the producer's farm and it is this location which determines eligibility to receive the differential. Moreover, the Appellants' arguments demon-

strate a lack of understanding as to the purpose of the utilization factor in the nearby differential as modified in 1957.

The record* reveals a number of factors supporting nearby differentials (Ref. # 19, p. 309; Ref. # 20, p. 417; Ref. # 21, p. 12341; Ref. # 22, p. 589; Ref. # 23, pp. 12538, 12541; Ref. # 24, p. 12713; Ref. # 25, p. 12975; Ref. # 27, p. 15001) which the Secretary summarized in his decision as follows:

> "Several factors and considerations have been advanced in support of nearby location differentials among which are (1) increased cost of production in the area, (2) they have been paid historically, (3) the inherent value of nearby milk to the market because of its availability and the high quality of such milk, (4) the more intimate relation between producer and dealer, (5) they compensate nearby producers for a relatively more even seasonal production, and (6) they compensate the nearby producers for the reduction in his share of the fluid market resulting from participation in a marketwide pool." (22 F.R. 4213)

The Secretary gave consideration to these factors and concluded that:

> "Factors (5) and (6) of those listed above are the only ones representing values for which compensation appropriately may be derived from the pool rather than directly from the handler receiving the milk.
>
> "The seasonal pattern of milk production in the nearby area is more uniform throughout the year than for the milkshed as a whole, and thus is a possible basis for location differentials payable out of the pool. However, because of the existence of considerable variation in the seasonal pattern of production among individual producers in all sections of the milkshed, it was proposed that a base rating plan be adopted as a

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* Citations in this brief to "Refs." are to the references contained in the two volume Compilation of excerpts from the Record agreed upon by the parties.

more equitable plan of apportioning returns to producers to compensate for uniform seasonal production."

The Secretary then went on to explain the reason for a nearby differential in the Order. Much of the Appellants' argument in opposition to the differential is based on the assumption that milk from nearby farms has no extra value: that the differential can be justified only as a difference in transportation costs and that, since these were realigned in 1957, there was no necessity for the differential here in question. However, the Secretary found that milk from nearby producers has a higher value which is not attributable to transportation costs alone. The basis for the nearby differential in question is found in the following excerpt from the Secretary's decision which follows the above quotation:

"Historically, the percentage of the milk produced nearest to metropolitan New York-New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers *than can be accounted for by the advantage in the cost of transportation to market*. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.

"*In order to provide benefits of more nearly equal value both to nearby and distant producers, some form*

of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

"The share of the fluid market that the nearby producer gives up through marketwide pooling depends not only on how his milk is actually used, but also upon the fluid utilization of all milk in the pool. If fluid milk utilization in the marketwide pool is high the nearby producer is giving up little through marketwide pooling. If, on the other hand, the fluid utilization is low, the nearby producer is contributing a considerable amount of the fluid market for the benefit of the entire pool. *Accordingly, location differentials constituting an equalization adjustment payable to nearby producers should be at rates varying inversely with the percentage of Class I milk in the pool.*" (22 F.R. 4213-4214, emphasis added.)

It is self-evident that if the Secretary possesses the authority under the Act to prescribe a fixed nearby differential (as he does under the *Rock Royal* and *Green Valley* decisions) he must possess the authority to make reasonable adjustments to the differential where circumstances which warrant the differential are subject to change. As found by the Secretary, the share of the fluid market which the nearby producer loses through pooling depends to some extent on the fluid utilization of all pooled milk for the marketing area. It is only logical that the Order should contain the scale found in Paragraph (3) of § 1002.71(b) to reduce and even eliminate the differential when the reason for it no longer exists. Rather than complain of this feature of the Order, the Appellants should welcome the protection which it affords.

It is true that the primary purpose of § 8c(5)(B) is to provide for the payment to producers of a uniform blended

price irrespective of the particular use made of a producer's milk to avoid the inequities which might arise if the price each producer received depended upon the use the handler might happen to make of his milk. *Stark* v. *Wickard*, 321 U.S. 288, 295 (1944). The incorporation of the utilization factor in the Order does not violate the objective. The Act requires uniformity in the blend price irrespective of the use "by the individual handler to whom it is delivered." (Act § 8c(5)(B)) We submit that in the application of the Order the particular use to which *a producer's milk* is put by the individual handler has no bearing on the amount of the nearby differential to which he is entitled. Under the table in Paragraph (3) of § 1002.71(b) of the Order the amount of the differential varies inversely with the *average utilization of all milk in the pool*, but it is not affected in any way by the particular use of milk from a producer. For example, if the average fluid utilization of *all* milk in the pool is less than 45%, the nearby differential to a producer in the 1-50 mile zone is 64¢ per hundredweight. The differential is at its highest under these circumstances, because, as found by the Secretary, the nearby producer is "contributing a considerable amount of the fluid market for the benefit of the entire pool". (22 F.R. 4214) On the other hand, if the percentage of fluid utilization of all pool milk is 80% or over, the nearby differential disappears entirely. This is logical since under these circumstances the nearby producer is giving up little for the benefit of the entire pool.

Thus, under a given percentage of fluid utilization of total pool milk, the nearby differential is fixed according to nearness to market and a producer in a given zone will be entitled to a higher differential than a more distant producer. It makes no difference so far as the producer is concerned whether his milk is sold by the handler in fluid form or for manufacturing purposes.

Nor does the utilization of the producer's milk affect the nearby differential through the operation of Paragraph (6)

of § 1002.71(b) of the Order. Here, the determinant is the relative volume of milk subject to the nearby differential when compared with the total fluid utilization of all of the milk in the pool. This provision was incorporated to prevent the nearby producers from increasing their production and obtaining higher differential payments. In short, this provision is also for the benefit of the more distant producers such as the Appellants. It is a logical safeguard, the justification for which is clearly set forth in the following excerpt from the Secretary's decision:

> "If nearby producers increase their production in relation to the volume of Class I-A milk in the pool, they will be contributing to a lower percentage of fluid utilization for the pool as a whole. In order that they may not become eligible for higher differentials solely because of their own increased production, provision should be made for an automatic reduction in the rates in the event that the volume of milk subject to the nearby differential increases in relation to total Class I-A milk in the pool. The determination as to whether production of milk to which the nearby differential applies has increased in relation to total Class I-A sales should be made, for the first time following the thirteenth month (and in similar fashion each month thereafter) for which the amended order for the expanded area is in effect, by calculating the difference between the ratios of (1) production of nearby milk to Class I-A sales in the first 12 months, and (2) production of nearby milk to Class I-A sales in the most recent 12-month period. Then the nearby differential rates should be reduced 10 percent for each point by which the latter ratio exceeds the former." (22 F.R. 4214)

(2) The Record Supports the Regulation.

The District Court found that there was "ample evidence in the record on which the Secretary could act . . ." (Appellants' Brief, Appendix p. 58) This finding is clearly supported by the record of the hearings before the Secretary.

The Report of the New York Milkshed Committee, January 1954 (Ref. = 31) contains the highlights of the history of differential payments in the New York market from the beginning of the century, many years prior to the promulgation of the Order. The Report shows that some form of differential existed in the "early 1900's" when Bordens established a long haul price beyond 100 miles from New York at 10c per hundredweight below the short haul price and location and transportation differentials existed in some form until 1938 when the Order became effective. The nearby differential required under the Order as made effective September 1, 1938, was but a continuation of the existing market practice. (Ref. = 31, p. 19)

The table included in the brief of the Appellee sets forth material compiled from Exhibits 13 and 14 of the promulgation hearing. The figures show that over a period of fifteen years between 1940 and 1955 the percentage of fluid utilization of milk from producers near the marketing area was considerably higher than the percentage of fluid utilization of the pool as a whole. Information comparing average prices for milk under the Order with average prices paid to farmers in Upstate New York marketing areas was before the Secretary (Ref. = 34). Testimony was given to the effect that the nearby differential was based in part on the fact of higher fluid utilization of the milk from nearby producers and that the differential should decrease as the total fluid utilization of all milk in the pool increases. (Ref. = 24, p. 12714; Ref. = 25, pp. 12973, 12977, 14611; Ref. =27, p. 15019)

The Secretary also had before him ample evidence of the high percentage of fluid utilization of milk from producers in Northern New Jersey for the years 1940 to 1955, many years prior to the extension of the Order to Northern New Jersey. (Ref. = 37) Voluminous tables were received in evidence showing that during the 15-year period 1940 to 1954 premiums over the prices under the Order

were paid for milk from New Jersey producers not subject to regulation under the Order and that such premiums were over and above any difference in transportation costs. (Refs. # 30, # 32, # 33, and # 36)*

There is no question but what there was an abundance of evidence adduced from the voluminous hearings held by the Secretary in promulgation of the order amendments. Nor can it be said that the District Court erred in holding that there was sufficient evidence on which the Secretary could base his findings or that it erred in refusing to substitute its judgment for that of the Secretary. Nevertheless, the Appellants would disregard this evidence because it was gathered under regulated market conditions. If this is a valid objection, it is submitted that the Secretary would never be justified in amending a milk order since, obviously, all of his findings would be based upon facts existing under regulated market conditions. While Appellants protest the lack of evidence under a "free market" there is no suggestion as to how such evidence could possibly be developed.

It is submitted that the District Court could not disregard the statistics set forth in the record as requested by Appellants. The issue before the lower Court was whether or not the contested provisions of the Order were in accordance with law. In resolving this issue the Court below was compelled to a review of the record of the administrative

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* It is relevant to point out here that the original notice of hearing was for two separate orders, a new order for New Jersey and an amended order for New York. Each was to contain a nearby differential (21 F.R. 3540; 21 F.R. 3568; 21 F.R. 3575). In addition, a base rating plan was proposed, one of the purposes of which was to meet the problem of seasonality of production—also one of the objectives of the nearby differential. (Ref. #20, p. 417; Ref. #27, p. 15003; Ref. #31, p. 20) Since the base rating plan was not adopted (22 F.R. 3340 and 22 F.R. 4217) the testimony and other evidence which was opposed to the nearby differential because the problem would be taken care of by the base rating plan cannot be construed as adverse to the nearby differential finally adopted. On the contrary, it is recognition of the need of a nearby differential, absent the base rating plan.

proceedings and in fact could not disregard it. *Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860 (C.A. 3, 1945); *Pearce* v. *Freeman*, 238 F. Supp. 947 (D.C. E.D. La., 1965).

In the final analysis, the Appellants' objection to the evidence merely means that they disagree with the conclusions reached by the Secretary. In asking the District Court to disregard the evidence, Appellants were in effect asking the District Court to substitute its judgment for that of the Secretary. The District Court quite properly refused to do so. It is well settled that where Congress has entrusted the responsibility of making determinations to the expertise of an administrative agency, the courts will not substitute their judgment for that of the administrative body merely because the court might reach a different conclusion. *Securities and Exchange Commission* v. *Chenery Corporation, et al.*, 318 U.S. 80 (1943); *Norton* v. *Warner Co.*, 321 U.S. 565 (1944).

(3) The Secretary Has Discretion as to the Most Appropriate Form of the Regulation.

The Appellants' objection, simply stated, goes merely to the form of the nearby differential provisions of § 1002.71(b) of the Order as promulgated by the Secretary in 1957. The Secretary was not bound by the particular form of regulation previously upheld in *Rock Royal* and *Green Valley*. Indeed, the Act directs the Secretary to issue "and from time to time amend" orders contemplated by the Act. (Act, § 8c(1)) Obviously, marketing conditions will change from time to time and these factors must be taken into account and orders changed accordingly.

The particular form of the Order which will best meet the problem and provide orderly marketing conditions as required by the Act is within the Secretary's discretion. In the regulation of an industry "so eccentric that economic controls have been found at once necessary and difficult" (*Hood & Sons* v. *DuMond*, 336 U.S. 525, 529 (1949)), much

discretion must of necessity be left to the administrator. "The background and the legislative history of this legislation leave no doubt that Congress gave the Secretary broad discretion in its administration." *Queensboro Farm Products* v. *Wickard, supra.* Provisions of a milk order "are largely matters of administrative discretion". *Stark* v. *Wickard, supra.* See also, *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 94 (C.A. 8, 1946), *cert. den.* 329 U.S. 788; *Grant* v. *Benson,* 97 App. D.C. 191, 229 F. 2d 765, (1955), *cert. den.* 350 U.S. 1015. Experts may disagree on the desirability of one formula over another but the test is whether the Secretary stayed within allowable limits in the use of the particular regulation he prescribed. *Mitchell* v. *Budd,* 350 U.S. 473, 480 (1956); *United States* v. *Mills,* 315 F. 2d 828, 838 (C.A. 4, 1963). We submit that the particular means selected by the Secretary to carry out the provisions of the Act is a matter within his expertise as administrator of the Act. *Secretary of Agriculture* v. *Central Roig Co.,* 338 U.S. 604, 613-614 (1950).

(4) The Secretary Has Not Acted Arbitrarily.

The provisions of the Order relevant to this action were promulgated by the Secretary after hearings pursuant to notice of proposed amendment to the Order (21 F.R. 3537), and supplemental notice of hearing (22 F.R. 1219). The supplemental notice set forth the proposals for amendment of the nearby differential to relate the nearby differential to distance beginning with the highest rate in the marketing area and decreasing to the lowest in the more distant zones and relating it also to fluid utilization of all pool milk (22 F.R. 1220).

Public hearings were held pursuant to said notices during the period June 18, 1956, to March 29, 1957. The subject of nearby differentials, their history and reasons for and against them were incorporated in the record. On the basis of this extensive record the Secretary on May 11, 1957,

issued his tentative decision and invited all interested parties to file written exceptions. (22 F.R. 3318) The provisions of the Order now under review were contained in the Secretary's tentative decision (22 F.R. 3336) and briefs were filed on both sides of the question (Refs. #6, #7, #8, #9, #10, #11).

It is apparent that the Order provision in question was promulgated in accordance with the procedure required under § 8c(1)(3) and (4) of the Act. Clearly, it cannot be said that he acted in an arbitrary manner.

C. THE CONTESTED PROVISIONS OF THE ORDER ARE NOT INVALIDATED BY SECTION 8c(5)(G) OF THE ACT.

The Appellants' contention that the nearby differential provisions of the Order are directly analogous to the compensatory payment provisions which the Supreme Court of the United States declared void in *Lehigh Valley Cooperative Farmers, Inc., et al.* v. *United States, supra,* is unsound.

The issue in the *Lehigh Valley* case related to the validity of a so-called compensatory payment required with respect to "outside milk", that is, milk brought into the New York-New Jersey marketing area from producers located outside of the milkshed. The milk subject to the payment was not from producers regularly associated with the New York-New Jersey market but rather from producers who were primarily engaged in supplying other milk market regions. Accordingly, the compensatory payment was levied on milk not subject to full regulation under the Order.

In contrast, the Appellants are producers regularly associated with the New York-New Jersey milk marketing area and their milk is fully regulated under the Order. There is no question here as to barring outside milk from other production areas such as contemplated by Section 8c(5)(G) of

the Act. The decision of the Supreme Court is carefully limited and the Court made clear that it was not deciding the issue which would be presented if the handlers before them were made subject to full regulation under the Order. The Court stated (370 U.S. 76, 99):

> "If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us. With respect to these petitioners, however, and with regard to the regulation here in issue, we conclude that the action of the Secretary of Agriculture exceeded the powers entrusted to him by Congress."

The Appellants' objection that the Order "at least limits the marketing of Appellants' milk" (Br. p. 20) is not sufficient to entitle them to enjoin the enforcement of the Order. A limitation as regards milk is not a trade barrier within the purview of § 8c(5)(G) and there is nothing to the contrary in the *Lehigh Valley* decision. In *Lehigh Valley* the Supreme Court struck down compensatory payments because they amounted to a prohibition on outside milk. In reaching its decision, the Court set forth a considerable amount of legislative history which recognizes that the provisions of § 8c(5)(G) were not intended to prevent the Secretary from exercising his legitimate price fixing authority. This is made clear from the following portions of the Conference Report explaining § 8c(5)(G) as finally enacted:

> "The conference agreement also denies the authorty to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. *The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk such as the provisions on price fixing, price adjustment, payments for milk, etc.*" (H. Rept. No. 1757, 74th Cong., 1st Sess., p. 21)

It may be that Appellants are at an economic disadvantage as a result of the nearby differential provisions of the Order but if such disadvantage does exist, we submit that it is not a trade barrier within the purview of § 8c(5)(G) of the Act. The fact that lawful competition may be more injurious by reason of Governmental regulation is not sufficient ground to support the Appellants' request for an injunction to restrain enforcement of the Order. *Hegeman Farms Corporation* v. *Baldwin, supra; Benson* v. *Schofield*, 98 App. D.C. 424, 236 F.2d 719 (1956); *United Milk Producers of New Jersey* v. *Benson*, 96 App. D.C. 227, 225 F.2d 527 (1955).

V. CONCLUSION

The judgment of the District Court should be affirmed.

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